United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

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74-2448

To be argued by
HENRY J. BOITEL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2448

UNITED STATES OF AMERICA,
Appellee,

—v.—

MANUEL LECLERES, RAMON GARCIA,
RAFAEL BAEZ, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT RAFAEL BAEZ

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UNITED STATES COURT OF APPEALS
FILED
FEB 4 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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BRIEF IN BEHALF OF APPELLANT RAFAEL BAEZ

Questions Presented for Review

1. Did the Government fail to elicit sufficient evidence with regard to the defendant Baez to warrant the submission of the case against him to the jury?

2. Should this Court reconsider its prior holdings with regard to whether a jury should be instructed that it is to exclude every reasonable hypothesis of innocence in circumstantial evidence cases?

STATUTES INVOLVED

18 U.S.C. § 371 - Conspiracy

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 2312 - Transportation of Stolen Vehicles

Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 2313 - Sale or Receipt of Stolen Vehicles

Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years or both.

PRELIMINARY STATEMENT

Rafael Baez appeals from a judgment of conviction entered against him on November 6, 1974, after a jury trial before the Hon. John M. Cannella in the United States District Court for the Southern District of New York.

The defendant Baez was jointly tried with the co-defendants Manuel LeCleres, Ramon Garcia, and Pedro Ortas. At trial, Mr. Baez was represented by Louis R. Aidala, Esq. On this appeal, he is represented by Henry J. Boitel, Esq.

The Conspiracy Count (18 U.S.C. § 371)

The indictment (A-5) was filed on March 29, 1974 and contained nine counts. Count One charged that the defendant Baez, together with the defendants Manuel LeCleres, Rafael Matos*, Ramon Garcia, and Pedro Ortas, conspired (18 U.S.C. § 371) to steal motor vehicles in states other than New York and to transport such vehicles in interstate commerce to the state of New York, and to thereafter conceal such vehicles within New York. The conspiracy was alleged to have existed from January 1, 1972 to the filing of the indictment. None of the alleged

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* Prior to trial, Matos entered a plea of guilty to Count One. He testified at trial as a Government witness.

overt acts of the conspiracy were claimed to have been commited by the defendant Baez. Each of the three defendants on trial was found guilty under the conspiracy count.

The Transportation Counts (18 U.S.C. § 2312)

Counts two (1964 Cadillac Sedan), four (1967 Mercury Cougar), six (1971 Dodge Swinger), and eight (1957 Ford Thunderbird) charged the defendant LeCleres, alone, with the transportation of the noted vehicles in interstate commerce knowing them to be stolen. LeCleres was found guilty as to counts two, four and eight, and was adquitted as to count six.

The Concealment Counts (18 U.S.C. § 2313)

Counts three (1964 Cadillac Sedan), five (1967 Mercury Cougar), seven (1971 Dodge Swinger) and nine (1957 Ford Thunderbird), respectively, charged receipt and concealment of the vehicles in question.

The defendants LeCleres and Ortas were charged and convicted as to count three;

The defendants LeCleres, Matos, Baez and Garcia were charged as to count five. Only LeCleres was convicted as to that count. The charge against Baez and Garcia was dismissed by the trial court due to insufficiency of evidence. The charge against Matos was disposed of by his pretrial plea of guilty to count one.

The defendants LeCleres, Baez and Garcia were

charged as to count seven. LeCleres was acquitted. Baez and Garcia were convicted.

The defendants LeCleres, Baez, Garcia and Ortas were charged and convicted as to count nine.

The Sentences

On November 6, 1974, the defendant Baez was sentenced to a term of imprisonment for a period of two years on each of counts one, seven, and nine to run concurrent with each other. The defendant Ortas was sentenced to a term of imprisonment for a period of 18 months on each of counts one, three, and nine to run concurrent with each other. The defendant LeCleres was sentenced to a term of imprisonment for a period of four years on each of counts one, two, three, four, five, eight and nine to run concurrent with each other, and was fined five thousand dollars on count one only. The defendant Garcia was sentenced to a term of two years imprisonment on each of counts one, seven, and nine to run concurrent with each other.*

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* On October 22, 1974, following the trial, the defendant Matos, who had entered a plea of guilty to Count One, was sentenced to a term of probation for a period of three years. Count five was dismissed as against him (A-3).

STATEMENT OF FACTS

The defendants Raphael Baez and Ramon Garcia ran an automobile repair shop on Wales Avenue in the Bronx. It was called the R & R Garage. (TR 571-582) The same property had once been run as a garage by Pedro Ortas, another co-defendant. It appears that in early 1972, or thereabouts, a fire occurred at the garage, causing Ortas to remove from the premises. As a result, Baez and Garcia took over the garage and renamed it. (TR 578-9, 685) Ortas, in turn, took over a garage on Melrose Avenue in the Bronx. (TR 600-3)

A) The Basic Scheme

According to the testimony of three admitted accomplices -Norberto Ramos, Rafael Matos and Juan Perez - who testified as Government witnesses, the co-defendant LeCleres utilized the two garages discussed above for the purpose of facilitating an interstate car theft operation. In brief, LeCleres, together with one or more of the Government witnesses, would steal cars in Connecticut and transport them to New York. (TR 239-51; 592-8, 744) The evidence revealed that every car has its own vehicle identification number (VIN). The same number appears in four or five places in the car's structure. Some of these places are readily observable (Public Vehicle Identification Number) and some of them are not

(Confidential Vehicle Identification Number). (TR 64-6)

According to the evidence at trial, LeCleres and his cohorts would locate and purchase wrecked cars identical to the makes and models of the stolen cars. The vehicle identification numbers, when on tags, would merely be switched from the wreck to the stolen cars. When such numbers were stamped into the body of the stolen car, they would be ground out and overstamped with the number from the wrecked car. The stolen car would, thereafter, be registered as though it were the legitimately acquired car.

The four cars which formed the subject matter of the instant indictment were a 1964 Cadillac sedan (Conspiracy count, overt act number 2 and counts 2 and 3); a 1967 Mercury Cougar (Conspiracy count, overt act number 3; counts four and five); a 1971 Dodge Swinger (Conspiracy count, overt act number 4, counts six and seven); and a 1957 Ford Thunderbird (Conspiracy count, overt act number 5; counts eight and nine). (A 5-10)

B) The Mercury Cougar

The charges with regard to the 1967 Mercury Cougar were dismissed by the Court as against the defendants Baez and Garcia due to insufficiency of evidence. (TR 979-80) We shall not, therefore, burden this Court with the record facts with regard to that vehicle.

C) The Cadillac

It was undisputed at trial that the 1964 Cadillac sedan had been stolen from one Ramon Hernandez on November 18, 1972 in Connecticut, that it was completely blue at the time it was stolen, and that it was subsequently found and seized at the garage of Pedro Ortas on Melrose Avenue. (A 65-90, 93-98) According to the Government witness Norberto Ramos, he brought the car to Pedro Ortas' Melrose Avenue garage in the fall of 1972, and saw it being partially repainted there. (TR 306-7) There is not a speck of evidence that this Cadillac was ever at the R & R Garage or that the defendant Baez was ever aware of its existence.

D) The Dodge Swinger

It was uncontested at trial that the 1971 Dodge Swinger was stolen from East Boston, Massachusetts on March 14, 1972 and that in or about April, 1972 it came into the possession of a Government witness, Miriam Rivera. (A 111-113) Miss Rivera claimed that she purchased it for $1500.00 from the co-defendant Ramon Garcia at the R & R Garage. (A 114-8) She made no claim of ever having spoken to or met the defendant Raphael Baez. Part of Miss Rivera's alleged payment for the vehicle was in the form of a Bank Check in the amount of $1,200.00. The Bank Check was made payable to herself and was endorsed

in blank. A vice president and general manager of the Greenwich Savings Bank, upon which the check was drawn, produced Government Exhibit 704 which is the teller's check in question (TR 481). It reveals an additional endorsement by the defendant Raphael Baez.

An officer of the Ponce de Leon Federal Savings Bank in the Bronx, testified that the records of the bank revealed that the defendant Baez had deposited Exhibit 704 in his account at the bank. Mr. Watts, who had known the defendant Baez for twelve or thirteen years (TR 488), also testified that there had never been any prior problems with regard to the defendant's account or financial operations and that there was nothing unusual about the defendant's transaction in depositing the check in question. (TR 496-7).

Significantly, the check is dated April 17, 1972 (see Exhibit 704) - the same date that Miss Rivera came into possession of the car (TR). However, it was not until April 21, 1972 that the defendant Baez deposited the check (TR 486-7). That this negotiable instrument came into Baez possession, was certainly no evidence that he was aware of the sale or history of the Dodge.Since someone in the vicinity other than Baez - perhaps his own partner - had sold the car, there was reason for the check to be in the area. Baez may well have received it in payment of a debt, or had cashed it as an accomodation in complete innocence. The fact that

he deposited it in his own account enhances that view.

E) The Thunderbird

The testimony at trial was that the 1957 Thunderbird was stolen from the Stamford, Connecticut railroad station on December 30, 1972 (TR 83-85). On August 13, 1973, F.B.I. Agents and New York City Police Officers executed search warrants at the R & R Garage (TR 798-9). The Garage actually has several levels and in a parking area on a lower level, there were found two vehicles, parked front to back. The innermost vehicle was the Ford Thunderbird, in a partially dismantled state and with its vehicle identification numbers removed (TR 820-828).

Three days after the seizure, the defendant Baez, of his own accord, appeared at F.B.I. headquarters and gave a statement with regard to the Thunderbird (TR 884-5). He alleged as follows:

> "In December, 1972, Raphael Matos he brought the car - 1957 Thunderbird - to have fix the head. For one month the car was left at 603 Wales and on 1/10/73, Ramon Garcia - my business partner - placed a lien on the car. " (A 83)

With regard to this same car, Matos testified that at the request of LeCleres, he had legitimately purchased a 1957 Thunderbird, and that some time later he observed that it had been replaced by a similar Thunderbird which was in good condition (TR 639-40; 642-5).

As noted, supra, the Connecticut Thunderbird apparently had been stolen on December 30, 1972. It was established at trial that the defendant Ramon Garcia had placed a lien on the vehicle, in his own name, on January 10, 1973. At trial, the Government made much of Baez' statement to the effect that the Thunderbird had been at the R & R Garage for a month before Garcia placed the lien on it. It was the Government's contention that Baez' assertion could not possibly be true since the Thunderbird had only been stolen 10 days prior to the lien. Thus, the Government contended that Baez' statement portrayed a consciousness of guilt. To the contrary, Baez statement is thoroughly consistent with the story told by the Government witness Matos. There is no reason at all to believe that Baez was not refering to the 1957 Thunderbird previously purchased by Matos. Significantly, the Thunderbird in question had been buried in the rear of a narrow garage and blocked by a second car. Since much of the other evidence in the case points toward the guilt of Garcia, there is every reason to believe that this was just one more ruse which Garcia had perpetrated upon Baez.

F) The Evidence Tending to Exculpate Defendant Baez

In his testimony, the Government witness Norbeto Ramos, who was, allegedly, LeCleres' principal source of stolen cars, attested that he received instructions

only from LeCleres (TR 259-60; 262); that he received payment only from LeCleres (TR 279); that he never had any conversation with Baez concerning stolen cars (TR 292); that Baez would never be present when any vehicle was altered (TR 301-3; see also Court's comment at 319); and that he never saw a stolen vehicle painted at the R & R shop (TR 324-5).

Similarly, the Government witness Raphael Matos, testified that he never spoke with Baez about the theft or alteration of cars (TR 582), and that he never witnessed any discussion between Baez and anyone else with regard to such subject matter (TR 585). Indeed, Matos, who visited the R & R premises at least every other day only saw Baez with LeCleres on two or three occasions. It was made clear at trial, that the R & R Garage was, in fact, a legitimate operation, regardless of what else it may have been used for, and that Baez' principal duties involved the purchase of used parts for repair purposes and therefore caused him to be absent from the garage most of the time (TR 586-7; 600-1; 630-5).

The Government witness Juan Perez, another LeCleres driver, who frequently visited the R & R Garage, attested that he never saw any of the stolen cars being worked on at the Garage (TR 746-7), nor did he ever see any vehicle identification numbers changed at the Garage (TR 748). He also verified that the R & R was a regularly

operating body and fender shop (TR 754-5).

G) The Ford Fairlane Story

During the course of his direct testimony, after first denying ever having any conversation with the defendant Baez concerning any specific vehicle, Matos was then led by the prosecutor, into an alleged recollection of a discussion concerning a Ford Fairlane. As to when the conversation had taken place, the witness could only state: "I don't remember the time, you know. It's so long ago." (TR 625). According to Matos, he had seen Baez driving a Ford Fairlane which was registered in the name of Baez' wife. Thereafter, he noticed that the same car was parked in Pedro Ortas' garage. Out of curiosity, he inquired of the defendant Baez what had happened to the car, and Baez responded that he had sold the car (apparently to Ortas). Matos continued his alleged recollection of the conversation as follows:

> "Q. Did you say anything else to him or did he say anything else to you?
>
> A. Yes, sir.
>
> Q. What was that?
>
> A. Well, I told him what happened to it, there was a fender missing. He told me the other fellow have an accident and I have been telling Ortas to put the fender back.
>
> Q. Who told you this?
>
> A. Raphael.

Q. He told you he had been telling Ortas to put the fender back?

A. Yes, sir.

Q. Did he say anything else?

A. Yes, sir.

Q. What did he say?

A. Well, he told me that he better put the fender back because right there they have the numbers. They are going to find out that the car is a stolen car." (626-7)

The vehicle in question is not mentioned in the indictment. In summation, the prosecutor conceded that the vehicle in question had not been stolen from interstate commerce (TR 1280). Assuming arguendo, that the witness's testimony is truthful, it revealed at most that the defendant Baez was aware that a particular car had been stolen within New York State and that the car had identification numbers.

An F.B.I. Agent testified to the discovery of such a vehicle, with altered numbers, at the garage of Pedro Ortas (TR 796-8). No evidence was adduced as to when the alteration had taken place. It was made clear, however, that the fact of alteration is not self-evident and the possession of a single vehicle with altered numbers is not sufficient to show knowledge on the part of the person possessing it (TR 875).

H) The LeCleres Conversation

According to Juan Perez, one of the admitted

accomplices who testified as a Government witness, about seven months after Baez and Garcia took over the Wales Avenue Garage, he overheard a conversation between them and the co-defendant LeCleres. He gathered from the conversation that the three of them intended to go into business together. However, Perez was not able to supply any of the details of the conversation, and did not testify that the three men spoke about going into the stolen car business or anything of that nature. (TR 739-40).

POINT I.

THE GOVERNMENT FAILED TO ESTABLISH BY SUFFICIENT EVIDENCE THAT THE DEFENDANT BAEZ WAS GUILTY OF THE CRIMES CHARGED. THE TRIAL COURT SHOULD HAVE DISMISSED THE CASE AGAINST BAEZ AND SHOULD NOT HAVE SUBMITTED IT TO THE JURY.

Our statement of facts, supra, sets forth in some detail the evidence directly relating to the defendant Baez. None of the admitted participants in the scheme ever worked with or in the presence of Baez with regard to the theft or alteration of the vehicles in question. No one testified to any conversation in Baez' presence concerning the fact that any of the vehicles mentioned in the indictment had been stolen or had been altered. The evidence leaves him simply a non-participant in every sense of the word.

There is not a scintilla of evidence in this case to the effect that the defendant had possession of or exercised dominion and control over any of the vehicles which were the subject matter of the instant indictment. Mere presence at the scene proves nothing as to possession of, or dominion over contraband. United States v. Dire, 332 U.S. 581, 593 (1948); Arahjo-Lopez v. United States, 405 F. 2d 467 (9th Cir., 1969); Glenn v. United States, 271 F. 2d 880, 883 (6th Cir., 1959); United States v. Euphemia, 261 F. 2d 441 (2nd Cir., 1958); United States v. Menier, 303 F. 2d 550, 557 (2nd Cir., 1962).

In United States v. Kearse, 444 F. 2d 62 (2nd Cir., 1971), the defendant was convicted upon a charge of possession of goods stolen from interstate commerce. Then Judge Kaufman, writing for a unanimous Court, held that the defendant's presence in an apartment which contained fourty cartons of stolen merchandise failed to constitute adequate proof of "dominion and control over the goods in question." Citing United States v. Romano, 382 U.S. 136, 141 (1965), the Kearse opinion held:

> "Presence tells us nothing about what the defendant's specific function was and carries no legitimate rational or reasonable inference that he was engaged in one of the specialized functions connected with possession."
>
> See also: United States v. Nitti, 444 F. 2d 1056 (7th Cir., 1971) and Paldino v. United States, 379 F. 2d 170 (6th Cir., 1967).

Certainly, upon the evidence adduced at the

instant trial, there was nothing relating to the defendant Baez' behavior which supported an inference that he participated in the stolen car scheme, much less that he knowingly did so. cf. United States v. DeKlunchak, 467 F. 2d 432 (2nd Cir., 1972).

In short, there was no evidence that the defendant agreed with anyone to embark upon a criminal course or that he had any voice in the criminal plot. United States. v. Infante, 474 F. 2d 522, 526.

As was held in United States v. Infante, supra, with regard to the appellant Kurtz,:

> "* * * but Kurtz's presence in the hotel room and the lack of evidence of his participation in the conversations that occurred there * * * do not establish the conclusion beyond a reasonable doubt that he was aware that the securities were stolen cf. United States v. Garguilo, 310 F. 2d 249, 253 (2nd Cir., 1962); United States v. Minieri, 303 F. 2d 550, 557 (aiding and abetting not proven from presence where an illegal act occurs). Without some further evidence of the quality of his participation, Kurtz's presence where illegal activity was being transacted does not establish his knowledge of the nature of the activity. See United States v. Cianchetti, 315 F. 2d 584, 588 (2nd Cir., 1963)." 474 F. 2d at 526

It is respectfully submitted that the evidence adduced at this trial with regard to the defendant Baez does not measure up to the evidentiary requirements of the cited authorities, and this Court should, therefore, reverse the conviction and dismiss the indictment as against him. United States v. Taylor, 464 F. 2d 240, 242-4 (2nd Cir., 1972).

POINT II.

THE TRIAL COURT SHOULD HAVE CHARGED THE JURY, AS REQUESTED, WITH REGARD TO THE SITUATION WHERE MULTIPLE INFERENCES MAY BE DRAWN FROM CIRCUMSTANTIAL EVIDENCE.

Following the Court's charge to the jury, the Court entertained exceptions and further requests to charge. The following exchange occurred between counsel for the defendant Baez and the Court:

> "MR. AIDALA: I object to that part of your charge on circumstantial evidence in which you did not explain to the jury that it is subject to an interpretation which is innocent as well as an interpretation --
>
> THE COURT: Have you read our District on that? Judge Mansfield wrote on it and says it doesn't apply to this District. If you want an exception, the Supreme Court may reverse the verdict.
>
> MR. AIDALA: I want it noted, Judge.
>
> THE COURT: Fine." (A 79-80)

In United States v. Fiore, 467 F. 2d 86 (2nd Cir, 1972), this Court was called upon to reconsider the issue of multiple inferences which may be drawn from circumstantial evidence. Although this Court has declined to undertake such a reassessment, upon the ground that the Fiore case was "not one solely of circumstantial evidence.", it did concisely acknowledge the conflict which presently exists among the Circuits:

"Appellant argues that the

evidence of his possession was circumstantial only in that we should adopt the Fifth Circuit rule that the inferences to be drawn from that circumstantial evidence must preclude every reasonable hypothesis which is consistent with innocence. United States v. Davis, 443 F. 2d 560, 564 (Fifth Circuit) cert. denied, 404 U.S. 945, 92 Supreme Court 298, 30 L. Ed. 2d 260 (1971); United States v. Casey, 428 F. 2d 229, 231 (Fifth Circuit), cert. denied 400 U.S. 839, 91 Supreme Court 78, 27 L.Ed. 73 (1970); Whaley v. United States, 362 F. 2d 938, 939 (Ninth Circuit, 1966). However, this Court has consistently rejected the reasoning of these cases, most recently in United States v. Taylor, 464 F. 2d 240, 244 (2nd Circuit, 1972), which regarded Holland v. United States, 348 U.S. 121, 139-140, 75 Supreme Court 127, 99 L. Ed. 150 (1954), as repudiating the Fifth Circuit view. See also United States v. Siragusa, 450 F. 2d 592, 596 (2nd Cir., 1971); United States v. Grunberger, 431 F. 2d 1062, 1066 (2nd Cir., 1970). Moreover, in this case, in addition to the circumstantial evidence deriving from the agent's observations of Bennett's entering the store only with cash and leaving only with heroin, there was the direct testimonial evidence of Bennett, the informant, himself. Regardless of any unreliability stemming from the informant's own participation in the drug traffic, or his refusal to testify at appellant's first trial (which resulted in the reversal referred to in note 1, supra), the jury was entitled to believe him and his testimony is not to be treated as "virtually useless" in the words of appellant's brief, or totally to be disregarded in weighing the sufficiency of the evidence. Thus, in any event, we do not have a case calling for a determination of the applicability of the Fifth Circuit standard because the case is not one solely of circumstantial evidence." (467 F. 2d at 88).

Unlike Fiore, supra, the instant case is, at best, one of circumstantial evidence as against the defendant Baez. None of the vehicles which form the subject matter of the charge of this indictment were shown to have been known by him to have been stolen vehicles, or to have been transported in interstate commerce. Similarly, no evidence was elicited at trial to the effect that the defendant participated in or knew about the alteration of vehicle identification numbers. It is respectfully submitted, therefore, that the instant case appropriately presents the occasion for the re-consideration of the so called "two inference" rule.

The rationale of the two inference rule was well stated in Union Pacific Coal Co. v. United States, 173 F. 737 (8th Cir., 1909):

> "There was a legal presumption that each of the defendants was innocent until he was proved to be guilty beyond a reasonable doubt. The burden was upon the Government to make this proof, and evidence of facts that are consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction ***" (173 F. at 743).

It is, of course, true that in Holland v. United States, 348 U. S. 121 at 139-140, the Court held

that, despite authority to the contrary, "...the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect...". The Court's reasoning in support of this contention is particularly fuzzy:

> "Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholely incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weight the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more." (id.)

We respectfully submit that, contrary to the view taken in Holland, the dual inference charge does not go beyond the requirement of reasonable doubt. Instead, that charge explains reasonable doubt within the context of a circumstantial evidence case. Where the prosecution introduces direct evidence of a defendant's guilt (e.g., the testimony of a witness who claims to have seen the defendant shoot the deceased), the principal fact in issue pertains to the credibility of the source of the direct evidence. On the other hand, where circumstantial evidence is utilized against a defendant, the jury must determine not only the credibility of the

source of that circumstantial evidence, but also the factual significance of the circumstantial evidence. If a jury may, without more, pick and choose amongst the equally valid possibilities which flow from circumstantial evidence, then a jury is given license to speculate as to the defendant's guilt or innocence. Such a rule clearly repudiates the reasonable doubt standard.

Notwithstanding the Holland opinion, several Courts have adhered to the view which we urge. United States v. Jones, 418 F. 2d 818 (8th Cir., 1969); Busby v. United States, 278 F. 2d 220 (5th Cir., 1960); South v. United States, 412 F. 2d 697, 699 (5th Cir., 1969); United States v. Smith, 493 F. 2d 24 (5th Cir., 1974); Whaley v. United States, 362 F. 2d 938 (9th Cir., 1966).

As was stated in Jones, supra:

> "Notwithstanding the Holland rule, the principles relied on here are certainly still applicable to criminal cases. Where the Government's evidence is equally as strong to infer innocence of the crime charge, as it is to infer guilt, we are not dealing in the realm of credibility, but legal sufficiency and a court has the duty to direct an acquittal. As Judge Van Oosterhout recently stated in Lerma v. United States, 387 F. 2d 187, 188 (8th Cir., 1968):
>
> > 'The Court properly instructed the jury on the circumstantial evidence, including therein the following: "If, however, circumstances to be considered in determining defendant's guilt are just as consistent with innocence as guilt, then the verdict must

be one of not guilty."
See Birth v. United States, 327
F. 2d 917, 919 (8th Cir.); Sykes
v. United States, 312 F. 2d 232,
235 (8th Cir.)' " 362 F. 2d at 939.

In a case such as the present one, where a defendant is surrounded at trial and in his own place of business by persons who have, admittedly, engaged in criminal conduct, every protection should be given to such a defendant lest he be the victim of a finding of guilt by association. If "beyond a reasonable doubt" does not mean the exclusion of every reasonable hypothesis of innocence, then one is hard put to understand what it does mean. It would certainly be well beyond the weight of actual opinion to suggest that specific reference to the dual hypothesis test would add nothing to the jury's understanding of "reasonable doubt". If not, why is there such strong prosecutorial opposition to such a charge? The failure to give such a charge is an invitation to speculation. Since the Court herein explicitly declined to give such a charge, the judgment of conviction should be reversed.

CONCLUSION

For all the above reasons, the judgement of conviction should be reversed and the indictment should be dismissed as against the appellant Baez; in the alternative, he should be granted a new trial.

Respectfully submitted,

Henry J. Boitel
Attorney for Appellant,
Rafael Baez.

January, 1975